

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

TYRONE KEYS	:	
	:	
Plaintiff,	:	
v.	:	Case No. 8:18-cv-02098-CEH-JSS
	:	
BERT BELL/PETE ROZELLE	:	
NFL PLAYER RETIREMENT PLAN	:	
and the NFL PLAYER DISABILITY	:	
& NEUROCOGNITIVE BENEFIT	:	
PLAN	:	
	:	
Defendants.	:	
_____	:	

**PLAINTIFF’S MOTION FOR PROTECTIVE ORDER REGARDING DEFENDANTS’
SUBPOENAS OF PLAINTIFF’S BANK RECORDS**

INTRODUCTION

Plaintiff, Tyrone Keys (“Keys”), is a former player in the National Football League. In this action, Keys seeks reinstatement of his NFL-related disability benefits under the Bert Bell/Pete Rozelle NFL Player Retirement Plan and the NFL Player Disability & Neurocognitive Benefit Plan (“Plans”). On June 24, 2019, the Defendant Plans filed Counterclaims against Keys for equitable relief under §1132(a)(3) of the Employee Retirement Income Security Act (“ERISA”). (Doc. 39). The Plans allege an overpayment of line-of-duty (LOD) benefits for a period of four years, from 1992 until 1996, and an overpayment of Total and Permanent (T&P) disability benefits over a thirteen-year period, from 2004 until 2017. The overpayment of LOD benefits is alleged to have occurred because of an award of workers’ compensation benefits Keys received. Keys reported that award to the Plans’ administrators in 2003. The overpayment of T&P benefits is alleged to have occurred because Keys did not provide a complete progress note of a car accident that occurred in the spring of 2002 and did not mention the car accident as a cause of his impairments when he

applied for T&P benefits in the fall of 2003. (Keys did not mention the car accident because it was not a cause of his disabling impairments in the fall of 2003).

The Plans' theory is that Keys' alleged omissions caused the Plans' administrators to improperly classify Keys as being disabled due to his pro football injuries and, since a football-caused T&P disability pays a higher monthly benefit under the Plans, the alleged omissions caused thirteen years of monthly overpayments. Thus, since August 2017, the Plans' administrators have offset Keys' alleged non-football (Inactive B) monthly T&P disability benefit to collect the alleged overpayment.¹ Now, in addition to offset, the Plans seek to trace the alleged overpayments in an attempt to create an equitable lien against a fund or assets belonging to Keys. To that end, the Plans have issued two Bank Subpoenas, attached as Exhibits 1 and 2 hereto, in which they seek 27 years of bank records of Keys and his wife, Bessie Keys, from 1992 to the present. The bank records are sought from Suncoast Credit Union (Exhibit 1) and Synchrony Bank (Exhibit 2). Keys moves for a protective order as to the Bank Subpoenas.

I. The Bank Records Of Keys And His Wife Are Not Relevant

Although courts in the Middle District of Florida have found that a party does not have standing to quash a third-party subpoena of his or her bank records under Fed. R. Civ. P. 45, the subpoena must nonetheless fall within the scope of discoverable evidence as defined by Fed. R. Civ. P. 26(b)(1). *Jaye Pipoli v. Ft. Myers Lodge #1899 Loyal of Moose Inc.*, 2015 WL9031929 *3 (M.D. Fla. 2015). Rule 26 permits discovery regarding non-privileged material that is relevant to any party's claim or defense. A party has a right to a protective order if the party requesting discovery through a third-party subpoena is seeking irrelevant information. *Cornett v. Lender*

¹ Defendants admit in their answer that the Board suspended Keys' Inactive benefits to partially recover the alleged overpayment. Doc. 39, ¶31.

Processing Services, Inc., 2012 WL 5305990 *1 (M.D. Fla. 2012)

As the Plans are well aware and have argued in other cases in Florida, when an ERISA case is to be decided under an abuse of discretion standard, discovery is extremely limited because the Court is acting much like an appellate tribunal and only “evaluates the reasonableness of an administrative determination in light of the record compiled before the administrator.”² *Epolito v. Prudential Ins. Co. of Am.*, 737 F. Supp. 2d 1364, 1369 (M.D. Fla. 2010). Thus, with limited exceptions, the Court’s review is confined to the materials available to the Plans’ administrators, *i.e.* the administrative record (“Administrative Record”). *Blankenship v. Metro. Life Ins. Co.* 644 F.3d 1350, 1354 (11th Cir. 2011). Generally, information that was not reviewed by a plan fiduciary when making a final decision on a benefit claim is not relevant to the Court’s inquiry. However, some additional discovery has been allowed plaintiffs, including discovery that might reveal bias of the fiduciary or flesh out procedural irregularities. *Bloom v. Hartford Life and Accident Insurance Company*, 917 F. Supp. 2d 1269, 1278 (S.D. Fla. 2013).

The established rules that severely limit discovery in ERISA cases are not made inapplicable simply because the fiduciary makes a counterclaim for overpayment and seeks equitable relief under 29 U.S.C. §1132(a)(3). Here, the rules limiting discovery in ERISA cases is buttressed by the fact that the Plans’ governing documents do not authorize the Plans to seek equitable relief under 29 U.S.C. §1132(a)(3) for an alleged overpayment of T&P benefits in

² In response to the plaintiff’s motion to compel discovery in *Ashmore v. NFL Player Disability & Neurocognitive Benefit Plan*, Case 9:16-cv-81710 previously pending in the United States District Court for the Southern District of Florida, the NFL Player Disability & Neurocognitive Benefit Plan urged the Court to deny the motion because “courts preclude or severely limit discovery in ERISA benefits cases.” *See* Doc. 29 (Defendant’s Response to Plaintiff’s Motion to Compel) at p. 3.

addition to collecting the alleged overpayment by offsetting the Plaintiff's Inactive B T&P benefits.

A. The Plan Provisions at Issue

In *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 100 (2013), the United States Supreme Court observed that Section 1132(a)(3) “does not . . . authorize appropriate equitable relief at large; rather, it countenances only such relief as will enforce the terms of the plan or the statute, §1132(a)(3).” (*internal cite and quotes omitted*). Thus, in determining what discovery is relevant in this case, it is incumbent upon the Court to look to the terms of the Plans.

In making its overpayment and recoupment claims in the final administrative denial, the Retirement Board relied upon the overpayment and recoupment provision within the 2001 and 2014 Amended and Restated Bert Bell/Pete Rozelle NFL Player Retirement Plans. The 2001, 2011, and 2017 Amended and Restated NFL Player Retirement Plans are within the Administrative Record that has been assembled by the Plans. The overpayment and recoupment provisions are substantially similar. The 2014 Plan provision upon which the Retirement Board relied in making its final administrative decision to recoup alleged overpayments provides as follows:

Section 12.12 Recovery of Certain Overpayments

If false information submitted by or on behalf of a Player causes a Player to receive amounts under the Disability Plan to which such Player is not entitled, any future disability benefits payable to the Player or his beneficiary . . . will be reduced by the amount of the overpayment from the Disability Plan plus an interest rate of 6% per year.

The Relevant Plan Provisions were attached to the Board's Final Decision on Review, contained within the Administrative Record, Keys_AR 05277-05287, attached hereto as Exhibit 3. The quoted Section 12.12 from the 2014 Plan is at Keys_AR 05287.

The only other provision that addresses overpayment and recoupment is contained within Section 8.2 of the 2014 Plan, entitled “Authority.” Section 8.2(o) authorizes the Retirement Board to “recover any overpayment of benefits through reduction or offset of future benefit payments **or other method chosen by the Retirement Board.**” (Exhibit 3, Keys_AR 05286) (emphasis added). The Retirement Plans that have been made part of the Administrative Record, amended and restated as of April 1 2001, August 1, 2011, and April 1, 2017 have essentially the same provisions regarding overpayment and recoupment. The first page and the overpayment and recoupment provisions of the Plans taken from the Administrative Record are attached as Exhibit 4.

As Defendants concede, the Plans’ administrators have been offsetting Keys’ Inactive T&P disability benefits since 2017. The Plans do not authorize the Plans’ administrators to file a counterclaim in addition to exercising offset. Rather, the Plans’ governing documents present an either-or proposition: **either** an offset of future benefits may be exercised to collect an alleged overpayment *or another method will be chosen by the Retirement Board.* In this case, the Plans’ administrators elected to offset Inactive B benefit payments owed to Keys in order to collect the alleged overpayment of T&P benefits. Given that election, the Plans are not authorized to engage in additional collection efforts, such as discovery to trace financial assets to try and place a lien on a certain fund or property owned by a plan participant.

In summary, the plan terms control. *McCutchen*, 569 U.S. at 101. The Plans’ administrators are not authorized to trace financial assets of a player in order to recoup an alleged overpayment of T&P disability benefits **in addition to** exercising an offset of disability benefits. Therefore, the information the Plans are seeking through the Bank Subpoenas is not relevant and will not lead to the discovery of relevant evidence.

LOCAL RULE 3.01(G) CERTIFICATION

The undersigned hereby certifies that prior to filing this motion, Jeff Dahl, lead counsel for Plaintiff, conferred with Michael Junk, lead counsel for Defendants, and is authorized to represent to this Court that Defendants object to the relief sought in this motion.

CONCLUSION

For the foregoing reasons, Plaintiff, Tyrone Keys, respectfully prays that his Motion for Protective Order be granted and that Defendants not be permitted to obtain any information pursuant to the Bank Subpoenas or, if Defendants have obtained any information in response to the Bank Subpoenas, that Defendants be required to immediately destroy such information; not retain any copies or duplicates thereof; and file a certificate of compliance with this Court that such destruction has occurred.

/s/ Lansing C. Scriven

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **PLAINTIFF'S MOTION FOR PROTECTIVE ORDER REGARDING DEFENDANTS' SUBPOENAS OF PLAINTIFF'S BANK RECORDS** has been electronically filed with the Clerk of the Court using the CM/ECF system. I further certify that a true and correct copy of the foregoing will be furnished through the CM/ECF system to counsel of record on this **19th** day of August, 2019.

/s/ Lansing C. Scriven